

August 27, 2020

**State Records Committee Meeting**

Date: August 27, 2020

Time: 9:00 a.m. – 3:00 p.m.

**Committee Members Present:**

Kenneth Williams, State Archivist  
David Fleming, Private Sector Records Manager  
Holly Richardson, Citizen Representative  
Patricia Smith-Mansfield, Chair, Citizen Representative  
Tom Haraldsen, Media Representative  
Nancy Dean, Political Subdivision Representative

**Committee Members Not Present:**

Vacant, Electronic Records and Databases Representative

**Legal Counsel:**

Paul Tonk, Assistant Attorney General  
Nicole Adler, paralegal

**Executive Secretary:**

Rebekkah Shaw, Utah State Archives

**Telephonic participation:**

Patrick Sullivan

**Others Present via Google Hangout:**

Wendy Park, Center for Biological Diversity  
Sophie Kaineg, Center for Biological Diversity  
Welsey Stapley, Department of Workforce Services  
David Ferguson, Salt Lake Legal Defenders  
Lynda Viti, Department of Public Safety  
Worth Mountjoy, CMI Incorporated  
Larry Agee  
Justin Anderson, Assistant Attorney General  
Sue Steel  
Roni Wilcox  
Paul Richins  
Neal Geddes, Attorney for Davis County  
Ryan McKenzie, Davis County Chief Deputy Clerk  
Dale Peterson, Davis County Assessor  
Rebecca Abbott, Davis County Records Manager  
Susan Mumford

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Rosemary Cundiff

10 other unique attendees listened in at various points of the meeting

**Agenda:**

- Five Hearings Scheduled
  - Center for Biological Diversity v. Dept of Workforce Services
  - Salt Lake Legal Defenders v. Dept Public Safety
  - Larry Agee v. Utah Dept of Corrections
  - Steel & Wilcox v. Utah Dept of Corrections
  - Paul Richins v. Davis County
- Business:
  - Approval of August 13, 2020, minutes, action item
  - SRC appeals received and declined, notices of compliance, and related action items
  - Cases in District Court, report
  - Other Business
    - Status of pending committee member approval, report
    - Fiscal year summary, report
    - Committee member's attendance for the next meeting to verify the attendance of a quorum

**Call to Order**

The State Records Committee Chair, Patricia Smith-Mansfield, called the meeting to order at 9:03 a.m.

**Business part 1 of 2**

The Chair read a letter stating the meeting will be held electronically and telephonically without an anchor location pursuant to Utah Code 52-4-207(4). The public may monitor the meeting and any public wishing to comment in the meeting can submit their request to the Executive Secretary. The letter is active for 30 days.

**1. Center for Biological Diversity v. Department of Workforce Services**

The Chair announced the hearing and provided instructions and reviewed the procedures.

The petitioner stated there are two appeals in this hearing and had a motion to continue 2020-42 because it may be resolved outside the hearing. The respondent stated they could resolve this appeal with a little more research.

**Motion** by Mr. Fleming to continue appeal 2020-42. Seconded by Mr. Williams. Age: 6 Nay: 0. Mr. Williams, Mr. Fleming, Mr. Haraldsen, Ms. Dean, Ms. Richardson, and Ms. Smith-Mansfield voted in favor of the motion.

**Petitioner's statement:**

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Ms. Kaineg stated the question before the Committee is whether the Department of Workforce Services (DWS) needs to provide an unredacted feasibility study to the Center. The study is about a prospective railroad connecting the Uintah Basin to the railway network.

Ms. Kaineg stated the Seven County Infrastructure Coalition (SCIC) received public funds to examine the economic benefit. The redacted report blocks tabular data that estimates the volume of commodities, the cost of the railway, profitability, and comparisons with other modes of transportation.

Ms. Kaineg stated even if the report is properly classified as protected, the public interest outweighs the private interest. She stated DWS did not explain how the unredacted report would cause financial harm to the state. She stated the respondent waived their ability to make the argument that the record is protected because their statement of facts was not submitted until the previous night instead of five days before the hearing.

Ms. Kaineg stated disclosure of the report is in the interest of transparency because the study would show whether the project is feasible and if it's a good investment of public funds. She stated 27.9 million dollars in public funds are used to develop the oil railway and the money is meant to be used to aid local communities in mitigating the impact of development. She stated the public cannot scrutinize or understand that without access to the underlying data.

#### **Respondent's Statements:**

Mr. Stapley apologized for his late submission. He stated he did not expect the appeal to be heard. He stated the record is protected under 63G-2-305(3) and there isn't anything new in terms of arguments submitted.

Mr. Stapley stated the study was provided to the Community Impact Board (CIB) by SCIC in 2018 and the SCIC had identified the study as protected due to commercial information that could lead to financial speculation. He stated release of the data would interfere with planned transactions and cause substantial damage to the state economy.

Mr. Stapley stated GRAMA does not require a full analysis about why a record is protected because that could disclose protected information. He stated the study has been provided and the redactions are specific numbers in terms of the break even point, the high and low amounts of commodities that might be shipped out on the railway. He stated providing those numbers would lead to speculation on the amount of crude available in the Uintah Basin. Mr. Stapley stated over half of the grant funds have been reimbursed to SCIC and releasing the data would interfere with an ongoing transaction.

#### **Questions from Committee:**

The Committee asked for elaboration about how the state is making the transactions. Mr. Stapley stated there are reimbursement made to the private sector and SCIC is the entity impacted as a pass through grant.

The Committee asked how the government would be harmed. Mr. Stapley stated it had more to do with the state economy being harmed because 17 million dollars has been spent and

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interfering with the transaction at this point would mean the state has wasted the grant money. He stated the project may not come to fruition as a result of interference. The Committee asked how much grant funding was remaining still needing to be reimbursed. Mr. Stapley stated 11 million dollars remained.

**Petitioner closing:**

Ms. Park stated Workforce Services is making a new argument they have not heard before. She stated the respondent has not explained how disclosure of information would interfere with the transactions or lead to a loss of the investment because the money is already spent.

Ms. Park stated the railway's ability to turn a profit is an important question for the public. She stated in order for the public to hold CIB accountable and understand the basis for providing these public funds to the railway, the underlying data supporting the conclusion needs to be disclosed. She requested the Committee require the full unredacted study being disclosed to the Center.

**Respondent closing:**

Mr. Stapley stated public discourse would make more sense if the public funds were unspent. He stated more than half the money has been allocated and the investment may be undone because of the interjection by the Center and others.

**Question from Committee:**

The Committee asked the respondent how the underlying data is different from other public information. Mr. Stapley stated he's not aware of what public information is available. The Committee asked if any of the information in the report was derived from other public materials. Mr. Stapley stated he believes other studies were used but he did not recall any publicly available data used.

**Motion** by Mr. Fleming to go in camera to review the unredacted record. Seconded by Mr. Haraldsen. Aye: 6 Nay: 0. Mr. Williams, Mr. Fleming, Mr. Haraldsen, Ms. Dean, Ms. Richardson, and Ms. Smith-Mansfield voted in favor of the motion.

**Motion** by Mr. Williams to return to open session. record. Seconded by Ms. Dean. Aye: 6 Nay: 0. Mr. Williams, Mr. Fleming, Mr. Haraldsen, Ms. Dean, Ms. Richardson, and Ms. Smith-Mansfield voted in favor of the motion.

**Motion** by Mr. Williams to grant the appeal as the Committee is not persuaded the release of the record will cause harm to the state economy or the governmental entity per 63G-2-305(3). Even if it was properly classified, the Committee is also persuaded that release of the record is in the public interest per 63G-2-403(11). Seconded by Mr. Fleming.

**Discussion to the motion**

The Committee stated they do not need to include the weighing provision, but would prefer to. Mr. Fleming stated he doesn't find sufficient evidence that harm to the state economy would occur. The Committee requested legislative intent to favor public interest be included in the

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order. Ms. Smith-Mansfield stated government is transparent when public funds are used and accountability of being government is different from the private sector.

Aye: 6 Nay: 0. Mr. Williams, Mr. Fleming, Mr. Haraldsen, Ms. Dean, Ms. Richardson, and Ms. Smith-Mansfield voted in favor of the motion.

The hearing concluded. An order will be issued within seven business days and both parties will receive a copy of the order. Each party has 30 days to appeal the Committee's decision to district court.

## **2. Salt Lake Legal Defenders v. Department of Public Safety**

The Chair announced the hearing and provided instructions and reviewed the procedures.

### **Petitioner's Statements:**

Mr. Ferguson stated Salt Lake Legal Defenders represent defendants who cannot afford an attorney. That includes cases involving DUIs. The subject of the request is an instrument used to test for DUI called the Intoxilyzer 8000.

Mr. Ferguson stated the Intoxilyzer 8000 is the exclusive breath testing instrument used in Utah. He stated the Department of Public Safety has control over their use in the state. He stated the results are nationally known to be unreliable. Mr. Ferguson stated the result of the test is often the sole evidence used to prosecute a DUI. He stated the parent company, CMI, does not allow anyone outside of law enforcement to purchase the machine, attend training, or access the materials. He stated there is public interest in access to the manuals for the Intoxilyzer 8000 so people are found guilty or innocent for the right reasons.

Mr. Ferguson stated trade secrets do not apply. He stated copyright does not apply because this would fall under fair use.

### **Respondent's Statements:**

Ms. Viti stated the respondent is requesting documents owned by CMI and anything the Utah Highway Patrol (UHP) created. She stated UHP turned over everything they created, but cannot provide copyrighted material. She stated the materials are not records under GRAMA and therefore not under the purview of the Committee.

### **Third party statements:**

Mr. Mountjoy stated he is an attorney for CMI Incorporated which is a Kentucky corporation. He stated he submitted a brief accompanied with the copyrighted pages. Any dissemination or publication would require CMIs' permission which they have not provided.

### **Petitioner's Closing:**

Mr. Ferguson stated he didn't receive a brief from Mr. Mountjoy. He stated the access is limited by copyright, so if the copyright creates a limitation then that would apply. He stated a non-limitation or exemption, such as fair use, applied then the material is a record.

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Mr. Ferguson stated a private company doing business with the government must be aware of transparency requirements. He stated no harm is caused by applying fair use.

**Respondent's Closing:**

Ms. Viti stated the manuals are not records in the statute and exempt per 63G-2-103(22)(b) so the Committee lacks authority to release the manuals.

**Deliberation:**

**Motion** by Mr. Williams to deny the appeal because the materials are not records per Utah Code 63G-2-103(22)(b)(4). Seconded by Ms. Dean.

Vote: Aye: 6 Nay: 0. Mr. Williams, Ms. Dean, Ms. Richardson, Mr. Fleming, Mr. Haraldsen, and Ms. Smith-Mansfield voted in favor of the motion.

The hearing concluded. An order will be issued within seven business days and both parties will receive a copy of the order. Each party has 30 days to appeal the Committee's decision to district court.

**3. Larry Agee v. Utah Department of Corrections**

The Chair announced the hearing and provided instructions and reviewed the procedures.

**Petitioner's Statements:**

Mr. Agee stated the case number he used in his appeal is incorrect. He stated he assumed UDC knew the record was public because it was part of the grievance process. He stated he filed a complaint that should be one of the responsive records.

**Question from the Committee:**

The Committee asked for clarification if the complaint involved him and was filed by him. Mr. Agee stated he asked for records pertaining to Mr. Thomas and his conduct. He stated the misconduct record was denied including the grievances. One of the grievances was filed by him. He stated he cited the court case number because that is involved as well.

**Respondent's Statements:**

Mr. Anderson stated the referenced court case was dismissed in April 2020 and is no longer active. Mr. Anderson stated he's tempted to recommend a continuance because his response is based on the wrong case number.

He stated any claim the records would implicate Mr. Agee's rights are not true. He stated the records are private and only made public if sustained. A record from the deputy director stated he reviewed the records and denied them as private records. The request was for seven years of disciplinary records and all seven years will not apply to the petitioner.

Even if they were sustained, Mr. Anderson stated Mr. Agee doesn't show that he's specifically referenced, or that the disciplinary record was sustained, as required by GRAMA.

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**Questions from the Committee:**

The Committee asked for clarification on the Chief Administrative Officer's response being denied under 63G-2-302(2)(d) which is invasion of personal privacy, not the provision that disciplinary records may not have been sustained. Mr. Anderson stated it was in direct response to Mr. Agee's appeal. He stated if the disciplinary records would fall under private somewhere. The Committee asked if the charges have been sustained. Mr. Anderson stated he's not certain but Mr. Agee is required to prove they've been sustained and refer to him.

**Petitioner Closing:**

Mr. Agee stated his appeal was based on 63G-2-301(3)(o) which says the disciplinary action is complete and the appeal expired. He stated if all actions are completed it would qualify them to be public. Mr. Agee stated the only way he can know which record mentions him would be to see the records.

**Respondent Closing:**

Mr. Anderson stated disciplinary actions need to be sustained and the appeal time needs to have run. He stated Mr. Agee must have some idea of at least one instance and time period to make the request more specific. He stated this request is a fishing expedition. He stated Mr. Agee should submit a request that is more specific.

**Deliberation:**

**Motion** by Mr. Fleming to deny the appeal due to lack of specificity per 63G-2-201(7)(b).  
Seconded by Ms. Dean.

Vote: Aye: 5 Nay: 1. Mr. Williams, Mr. Fleming, Ms. Richardson, Mr. Haraldsen, and Ms. Dean voted in favor of the motion. Ms. Smith-Mansfield voted against the motion.

The hearing concluded. An order will be issued within seven business days and both parties will receive a copy of the order. Each party has 30 days to appeal the Committee's decision to district court.

The Committee took a fifteen minute break for lunch.

**4. Steel & Wilcox v. Utah Department of Corrections**

The Chair announced the hearing and provided instructions and reviewed the procedures.

**Petitioner's Statements:**

Ms. Steel stated they submitted a document the morning of the hearing which they'd like the Committee to accept. She stated the initial request was to search Google Vault to search her name, Ms. Wilcox's name, and her email address. She stated after receiving a denial, she sent instructions on how to search Google Vault. She stated a request with reasonable specificity can still be voluminous.

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Ms. Steel stated Director Hudspeth's response stated he didn't intend to deny the request. Google Vault only searches active accounts. She stated the fee estimate was \$840. She stated she felt that was unreasonable.

Ms. Wilcox stated Corrections had already done the work. She stated 852 emails related to two moms is excessive and more must be going on.

Ms. Steel stated Corrections had not denied their fee waiver. The records requested are specific to them. She stated the charges are extreme and should not be considered reasonable. She stated Corrections already pays someone to do the work so the requester should not be required to pay those wages.

**Respondent's Statements:**

Mr. Anderson requested a continuance because he did not receive new documentation this morning.

**Question from the Committee:**

The Committee asked the petitioner if they sent the document to the respondent. Ms. Steel stated she only sent it to the Committee but it was just the one page document she just read. She stated there is nothing additional. Ms. Wilcox stated it's just a summary and there is no new information involved.

**Motion** by Mr. Williams to deny the request for a continuance. Seconded by Mr. Haraldsen.

Vote: Aye 6. Nay: 0. Ms. Yates, Mr. Fleming, Ms. Richardson, Mr. Haraldsen, Ms. Dean, and Ms. Smith-Mansfield voted in favor of the motion.

**Respondent's Statements:**

Mr. Anderson stated the appeal should be denied. He stated there may be records found in the Google Vault search not referencing Ms. Steel. He stated the petitioner staged at least one protest at the prison and in front of the admin building. The Executive Committee may have notified employees so many of those emails were simple notifications and there is no basis that anything nefarious is going on.

Mr. Anderson stated their appeal to Hudspeth didn't include a statement or reference or other information regarding the fee waiver. It just sought reversing the denial and all responsive records being provided. He stated the question of a fee waiver isn't before the Committee.

**Question from the Committee:**

The Committee asked if the first response denied the fee waiver. Mr. Anderson stated the petitioner treated it as a denial of the whole request. He stated the denial meant the respondent should resubmit a more specific request. The Committee asked if there is a denial of the fee waiver from the Chief Administrative Officer. Mr. Anderson stated the fee waiver wasn't before the Chief Administrative Officer.



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**Respondent's Statements:**

Mr. Anderson stated the appeal for a fee waiver should be denied because the petitioner did not address being the subject of the records. He stated a request for a fee waiver was not before Mr. Hudspeth when he received the appeal. He stated the time and effort required to compile the records means the denial is still reasonable.

**Question from the Committee:**

The Committee asked how much time has been estimated to do the work. Mr. Anderson stated it is about 40 hours at \$21 an hour. The expected amount of outreach is minimal. He stated the petitioner was asked to submit a deposit of \$100. If the actual cost is less than \$840, they won't be charged the whole amount.

**Petitioner Closing:**

Ms. Steel stated the protest was held after the time of the record request. She stated no fee waiver was requested because they assumed all the reasons of denial were part of the appeal. She stated the denial does not specify the fee was denied, but the entire request was denied. She stated the work has already been done so it is unreasonable to charge for that work.

**Respondent Closing:**

Mr. Anderson stated Corrections isn't required to provide copies of GRAMA sections in its replies. He stated requesters are required to learn the requirements for appeals. On appeal they only asked for access to the records. He stated they have a statutory duty to request all relief sought. He stated Corrections hasn't done all the work yet. They haven't exported or redacted the records.

**Question from the Committee:**

The Committee asked if any of the fee is specific to determining if all the records are responsive. Mr. Anderson stated they would only charge for the responsive records and compiling the record. The Committee asked where the \$21/hour comes from. Mr. Anderson stated it matches the salary of the lowest person with the skill to do the work.

**Deliberation**

**Motion** by Ms. Dean to deny the appeal for a fee waiver based on 63G-2-203(1) that allows a governmental entity to charge a reasonable fee for the actual cost of providing a record. Seconded by Mr. Williams.

Vote: Aye 6. Nay: 0. Ms. Yates, Mr. Fleming, Ms. Richardson, Mr. Haraldsen, Ms. Dean, and Ms. Smith-Mansfield voted in favor of the motion.

**5. Paul Richins v. Davis County**

The Chair announced the hearing and provided instructions and reviewed the procedures.

The respondent had submitted a motion to dismiss the appeal.

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**Respondent's Statements:**

Mr. Geddes stated the petitioner failed to file the appeal in a timely manner. He stated Mr. Richins' first request to the county was as a property tax appeal. Through the fall of 2019 the county was addressing his concerns through the administrative tax appeal process. The petitioner made the request for access and inspection of records maintained and relied on the county to determine the market value of his property and his neighborhood. He submitted multiple requests, but they are the same request. The county decided to not respond because it was being addressed through the administrative tax appeal process. He stated the petitioner didn't file an appeal until well past the 30 day deadline from the non response.

**Question from the Committee:**

The Committee asked if the request was answered when he appealed. Mr. Geddes stated they responded after the notice of appeal and notified him the appeal was late. He stated the county made clear they had no obligation to respond but wanted to resolve his concern.

**Petitioner's Statements:**

Mr. Richins stated his request was a contingent request for documents if the county would not grant the lower value for his home. He stated the county offered to give him access to the model which expanded the record request. He stated they granted his request and he was able to view the model used to value his property.

**Motion** by Mr. Fleming to not grant the motion to dismiss. Seconded by Ms. Richardson.

Vote: Aye 6. Nay: 0. Ms. Yates, Mr. Fleming, Ms. Richardson, Mr. Haraldsen, Ms. Dean, and Ms. Smith-Mansfield voted in favor of the motion.

**Petitioner's Statements:**

Mr. Richins stated he had a problem with the way Davis County valued the home he occupied 10 years ago. He stated the county uses two software programs to determine the value of properties. He stated the county never gave him a record showing how the \$390,000 value was determined.

**Respondent's Statements:**

Mr. Geddes stated GRAMA's definition of a record requires the information be reproducible. He stated the data comes from multiple sources but they tried to make a copy. He stated proprietary software and computer programs are not a record. The county purchased a program to create a mass appraisal system. He stated the protected data cannot be filtered so the county received a waiver from Utah Real Estate and gave the petitioner 60 days to view the data. He stated the petitioner did not take advantage of that until the end of the 60 days. He stated GRAMA does not require governmental entities to explain how their software works.

**Witness statements:**

The Chair swore in Mr. Dale Peterson as a witness.

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Mr. Peterson explained how the value of the home was determined by the model. He stated notes in the system cannot be identified with specific sales without knowing more data elements.

**Respondent's Statements:**

Mr. Geddes stated the mass appraisals model does not fit the definition of a record under GRAMA. He stated the county provided him with access despite that. He stated he didn't know what additional effort the Committee could order them to do.

**Petitioner Closing:**

Mr. Richins stated his request concerns how the county is valuing the home. He stated he is looking for summary data defined in GRAMA as a record which would not disclose private, controlled, or protected information. He stated at some point the data moves from being protected to public.

**Respondent Closing:**

Mr. Geddes stated he is trying to understand what Mr. Richins says wasn't provided. He stated the petitioner has looked at the code and he took copies of the algorithm. He stated the purpose of GRAMA is not to educate the petitioner on how the appraisal model works.

**Deliberation**

**Motion** by Mr. Fleming to deny the appeal as the Committee is persuaded the respondent fulfilled the request to the best of their ability. Seconded by Mr. Williams.

Vote: Aye 6. Nay: 0. Ms. Yates, Mr. Fleming, Ms. Richardson, Mr. Haraldsen, Ms. Dean, and Ms. Smith-Mansfield voted in favor of the motion.

**Business part 2 of 2**

**Motion** by Mr. Fleming to approve the August 13 minutes as amended, including updating previous minutes with the Committee vacancy listed separately. Seconded by Mr. Williams.

Vote: Aye: 6 Nay: 0. Mr. Williams, Ms. Dean, Mr. Haraldsen, Ms. Richardson, Mr. Fleming, Ms. Smith-Mansfield voted in favor of the motion.

**Report on Cases in District Court:** Paul Tonks, Assistant Attorney General, provided updates on the current appeal cases under judicial review.

**Report on Appeals and the FY summary received**

Ms. Shaw reviewed the status of appeals and a summary of the last fiscal year.

**Motion** by Mr. Williams to approve the Fiscal Year report. Seconded by Ms. Dean.

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Vote: Aye: 6 Nay: 0. Mr. Williams, Ms. Dean, Mr. Haraldsen, Ms. Richardson, Mr. Fleming, Ms. Smith-Mansfield voted in favor of the motion.

**Committee members' attendance polled for next meeting, format and quorum verification.**

The Chair verified a quorum will be present at the September 10th meeting.

**Motion to Adjourn**

The Chair adjourned the August 27, 2020, State Records Committee meeting at 3:08 p.m.

**This is a true and correct copy of the August 27, 2020, SRC meeting minutes, which was approved on September 10, 2020. An audio recording of this meeting is available on the Utah Public Notice Website at <https://archives.utah.gov>.**

**X           /e/ Rebekkah Shaw**  
**Executive Secretary**